Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213
	)	

REPLY COMMENTS OF U S WEST, INC.

I. U S WEST, INC. SUPPORTS THOSE OPPOSING THE DEPARTMENT OF JUSTICE'S AND FEDERAL BUREAU OF INVESTIGATION'S PETITIONS

U S WEST, Inc. ("U S WEST") supports the positions of those parties filing in opposition to the Department of Justice's ("DOJ") and Federal Bureau of Investigation's ("FBI") Petitions for Reconsideration ("PFR") regarding the scope of carrier obligations with regard to their security practices and manuals.[1] Most especially, we agree with those commenting parties objecting to the DOJ/FBI's attempt to secure the institution of "surveillance status message" as a "security practice" rather than a desired law enforcement assistance network capability.

In its October 25, 1999 PFR, the DOJ/FBI asked the Federal Communications Commission ("Commission") to reconsider certain of its requirements with respect to carriers' implementation of Section 105 of the Communications Assistance for Law Enforcement Act ("CALEA"). In that PFR, the DOJ/FBI requested several changes to the personnel security

[1] As a number of commentors point out, the DOJ/FBI actually filed two PFRs in this proceeding: one on Oct. 25, 1999 with respect to In the Matter of Communications Assistance for Law Enforcement Act, Report and Order, 14 FCC Rcd. 4151 (1999) ("First Report and Order"), modified on recon., CC Docket No. 97-213, Order on Reconsideration, FCC 99-184, rel. Aug. 2, 1999 ("Order on Reconsideration"); and one on Nov. 12, 1999 with respect to the Second Report and Order, FCC 99-229, rel. Aug. 31, 1999 ("Second Report and Order"). Comments/Oppositions were filed on Feb. 7, 2000. See SBC Communications, Inc. ("SBC") at n.1; MCI WorldCom, Inc. ("MCI") at 1, 3.

obligations mandated by the Commission with respect to carriers. Specifically, the DOJ/FBI requested that the Commission change its position and mandate carriers to maintain a list of employees designated to facilitate electronic surveillance; that designated employees be subject to background checks; and that designated employees sign non-disclosure agreements. In addition, the DOJ/FBI requested that carriers be required to report security breaches as soon after discovery as was reasonable in light of privacy considerations and the needs of law enforcement; and carriers maintain records of the date and time at which an interception of communications or access to call-identifying information was enabled. Finally, the DOJ/FBI requested that carriers be required to provide surveillance status message capability under Section 105, in light of the Commission's determination that such was not required under Section 103 of CALEA.

The overwhelming majority of filing parties object to the DOJ/FBI's requested reconsideration. U S WEST supports those oppositions.[2] For the most part, the DOJ/FBI does nothing more than repeat its previously-pressed claims and arguments, as those were presented during the course of the rulemaking.[3] For this reason alone, the PFRs should be denied. Having already considered these positions and arguments, and having rejected them (correctly, in U S WEST's opinion), the Commission should reject the DOJ/FBI's request to have the matter reconsidered.

---

[2] U S WEST supports the position of those arguing that the National Telephone Cooperative Association ("NTCA") PFR be granted, asking for a true-up between the Commission's First Report and Order and 47 C.F.R. § 64.2103(b). Clearly, the Commission did not mean to require that a single individual be the only point of contact for law enforcement, as is evidenced by its First Report and Order language at ¶ 25. See Bell Atlantic at 2; DOJ/FBI at 2; Personal Communications Industry Association ("PCIA") at 5-6.

[3] See AT&T Corp. ("AT&T") at 10; Bell Atlantic Mobile, Inc. ("BAM") at 1-2; Cellular Telecommunications Industry Association ("CTIA") at 1; Motorola, Inc. ("Motorola") at 1-2, 6, 7; NTCA at 2; PCIA at 2; Telecommunications Industry Association ("TIA") at 1, 6; The United States Telecom Association ("USTA") at 2.

With respect to modifications to the Commission's current positions on personnel security issues, the timing for reporting breaches of security, and the reporting of the timing of interceptions placed on telephone circuits, the DOJ/FBI presents no compelling arguments that the Commission's previous determinations are erroneous, either as a matter of law or policy. Indeed, such case cannot be made. For this reason, as well, the PFRs should be denied.

Where the DOJ/FBI does present new "evidence," it does so in a manner violating all notions of reasonable practice and fundamental fairness.[4] The DOJ/FBI seeks to use its PFR as an end-run around a different Commission Order, i.e., the Third Report and Order[5] in this proceeding (wherein the Commission rejected the FBI's assertion that surveillance status message was a capability required by CALEA to be offered by carriers), to secure relief denied in that independent regulatory action.[6] Having determined not to seek reconsideration with respect to that Third Report and Order,[7] the DOJ/FBI seeks to have "reconsidered" in this

---

[4] See AT&T at 7 ("The FBI's filing makes no attempt to explain why the FBI never raised this interpretation of section 105 in any of its nine previous filings in this proceeding (which lasted more than two full years)."); BAM at 6-7 ("The Commission does not permit parties to sit on issues during the notice and comment process and then raise them for the first time on reconsideration -- in this case, a full year after the comment period closed."); PCIA at 3.

[5] In the Matter of: Communications Assistance for Law Enforcement Act, Third Report and Order, 14 FCC Rcd. 16794 (1999) ("Third Report and Order"), pets. for rev. pending sub nom. United States Telecom Association v. FCC, No. 99-1442 (D.C. Cir.).

[6] See Bell Atlantic at 1 (arguing that the DOJ/FBI is pursuing a "backdoor approach" on this issue), 3-5; Motorola at 1-2 (arguing that the DOJ/FBI seeks to use its PFR "as a 'backdoor' for relitigating a completely unrelated issue"); PCIA at 2 (objecting to DOJ/FBI's "attempt to use [its] petition as a 'backdoor' for relitigating an already resolved and completely unrelated issue"); TIA at 2-5 (calling this a "'backdoor" [attempt] for circumventing a separate -- and unrelated -- decision by the Commission"); USTA at 3-4 (noting that this issue was not considered in the context of the First Report and Order and, therefore, is not appropriately "reconsidered" through the DOJ/FBI's PFR).

[7] See DOJ/FBI PFR at 8.

proceeding an item that was never "considered" in the first instance. The DOJ/FBI's request should be sternly rejected.

II. CARRIERS' PRACTICES NEED NO FURTHER REGULATORY MANDATES

A. Additional Employee "Security" Requirements

U S WEST agrees with Bell Atlantic that the Commission's First Report and Order correctly corresponded to the requirements of Section 105, in that the implementation of that Section "required [the Commission] to adopt only 'a very limited set of rules.'"[8] As pointed out by other commenting parties, not only does the DOJ/FBI ignore the general proposition that "less is better" under a Section 105 analysis, its PFR simply renews already-rejected arguments.

Nowhere does the DOJ/FBI demonstrate that its proposals would not represent inappropriate intrusions into the management of personnel by carriers,[9] as well as invasions into the privacy of that personnel.[10] For this reason, its requests for the designation of carrier personnel involved in interceptions,[11] for employee background checks,[12] and the signing of non-disclosure agreements is unwarranted.[13]

---

[8] Bell Atlantic at 2. Also see BAM at 2-3 (noting that the statute requires the promulgation of rules only "as necessary" with respect to carrier practices).

[9] See AT&T at 3 (quoting from the First Report and Order, 14 FCC Rcd. at 4162 ¶ 25), 5; CTIA at 2; NTCA at 9; TIA at 5; USTA at 3.

[10] See AT&T at 4; BAM at 5 (and noting possible conflicts with other federal and state human resources and labor obligations); Bell Atlantic at 3 and n.9; Motorola at 6-7; TIA at 5.

[11] See AT&T at 2-3; CTIA at 4; NTCA at 2-4; USTA at 3.

[12] See AT&T at 3-4; BAM at 4-5; CTIA at 3-4; Motorola at 6-7; NTCA at 4-5, TIA at 5-6; USTA at 3.

[13] See AT&T at 4-6; CTIA at 4 (noting that any such requirement is unnecessary "and duplicative with existing law. As the FBI acknowledges, current law already imposes a duty of non-disclosure on carriers and personnel under criminal and civil penalty. Indeed, every court

As TIA so artfully put it, "These employees are not criminals, nor are they applying to become agents of the [FBI]. If Congress had shared the FBI's rampant mistrust, it would not have entrusted the responsibility for implementing wiretaps to carrier employees."[14] U S WEST would only add that that "entrustment" has a long history[15] -- one not shown by the FBI to have been rendered "suspect" by any Congressional action associated with the adoption of CALEA.

The Commission need not enact rules to guard against some speculative,[16] frankly irrational, concern that runs counter to logic and reason.[17] The Commission especially should

---

order for electronic surveillance comes with a standard non-disclosure paragraph to remind carriers and their personnel of this duty."); NTCA at 5-6; TIA at 5-6; USTA at 3.

[14] TIA at 5-6. And see AT&T at 3 (noting that "telecommunications carriers and their personnel were intentionally placed as a protective buffer between law enforcement and the activation of electronic surveillance."), 4 (the personnel of carriers "are not criminals, targets or suspects -- they are trusted employees of a telecommunications carrier."); CTIA at 3. See also infra. note 15.

[15] Compare CTIA at 2 ("Ever since wiretaps were ensconced in the law, carrier personnel have faithfully followed the law and maintained the security, integrity and confidentiality of wiretaps. It is no surprise that, in all of its pleadings, the FBI is unable to cite even a single example of a security breach by carrier personnel[,]" and noting that CALEA changes nothing with respect to a carrier's cooperation with law enforcement in the context of wiretap implementation); NTCA at 4-5 ("[C]arriers have been hiring trustworthy employees for years. Employees of various carriers are responsible for ensuring the integrity of the communications systems of the entire United States. Each carrier hires individuals to receive payments, pay its bills, balance its accounts and handle, install and maintain millions of dollars worth of equipment. Carriers are very much concerned about having trustworthy employees.").

[16] See BAM at 3 (stating that the DOJ/FBI PFR "is based entirely on pure speculation about what might possibly happen in the future that might somehow compromise security in some unspecified way."); CTIA at 7 (noting that the DOJ/FBI conjures up the most strained hypothetical to support its position); NTCA at 9 (stating that the DOJ/FBI offers nothing in support of its position "other than speculative and unsubstantiated fears that a carrier would place its business convenience ahead of the safety and well-being of its subscribers.").

[17] See AT&T at 5 (arguing that the DOJ/FBI proposal for executed affidavits "appears to assume a lack of professionalism among individuals in the carriers' security departments and suggests a widespread practice of informal discussions about surveillance activities by carrier employees. Nothing could be further from the truth."); Motorola at 6 (noting that "the FBI's proposals assume a lack of professionalism among carrier employees that is both untrue and inconsistent with [Congressional] intent."). And, as Bell Atlantic points out, "If there is really a 'great

not do so when the DOJ/FBI's "support" for its position is the somewhat half-truth argument that carriers would not oppose its request since such would not be a substantial departure from their current conduct.[18] As BAM stated (and as U S WEST previously advised the Commission),[19] many carriers have "had in place for many years internal procedures that ensure that only those employees who are fully trained in the obligations imposed by federal and state wiretap laws participate in surveillance efforts, and only trained employees have access to interception records."[20] The DOJ/FBI has totally failed to overcome the logic and sound policy associated with the Commission's resolution of the issues sought to be "reconsidered."[21] For this reason, its PFR should be denied.

B. Reporting Of Breaches Within A Reasonable Time

The DOJ/FBI's PFR regarding the reporting of breaches of security within a reasonable time, as measured against privacy concerns and needs, should also be rejected. Under the requirements of the First Report and Order, carriers are already required to report breaches of

---

danger' of this sort [quoting from DOJ/FBI PFR at 3], it has always existed, as it is inherent in conducting interceptions using carrier facilities, and it has nothing to do with CALEA." Bell Atlantic at 3.

[18] See DOJ/FBI PFR at 4. The "support" heralded by the DOJ/FBI is but a half-truth, since carriers making the claim referenced by the DOJ/FBI at the same time argued that the ongoing, habitual practice, rendered rules in this area unnecessary. BAM at 5-6 and n.7 (clarifying just what the DOJ/FBI cited comments of BellSouth and U S WEST said). And see AT&T at 5 (noting that the execution of affidavits creates the possibility of independent liability for an employee, beyond the risk of loss of employment for deviation from a carrier's required practices); NTCA at 6 (noting that, in any event, "every new regulation that carries an obligation and a potential penalty for noncompliance is, in fact, a substantial burden.")

[19] See Comments of U S WEST, filed herein, Dec. 12, 1997 at 16-17. See also Reply Comments of U S WEST, filed herein, Feb. 11, 1998 at 13-14.

[20] BAM at 5.

[21] See Bell Atlantic at 3.

security. There is nothing to suggest that they will not do so in a timely, reasonable[22] -- and responsible -- manner.[23] The "reasonableness standard" proposed by the DOJ/FBI fails to incorporate additional reasonable, material factors that would otherwise be considered in any "reasonableness" analysis.[24] Its request for reconsideration on this issue should be denied.

C. Date/Time Associated With Opening A Circuit For Surveillance

U S WEST agrees with AT&T and CTIA that the Commission's decision requiring carriers to record the start time and date for "opening a circuit," rather than the start/stop time of an interception, is the right decision.[25] The DOJ/FBI PFR asks the Commission to revert to a position that it has been advised is not possible, i.e., carriers do not currently record the information that the DOJ/FBI wants tracked. Moreover, carriers have no business purpose to capture such information. The Commission's resolution of this matter "is consistent with existing [carrier] documentary practices and capabilities"[26] and should be sustained. The DOJ/FBI presents no credible evidence to support its proposal or to overcome the propriety of the Commission's current mandates on this matter.

---

[22] Indeed, BAM and CTIA point out that the Commission required carriers to report any breaches of security with a "reasonable" time in its First Report and Order, 14 FCC Rcd. at 4169 ¶ 38. See BAM at 7; CTIA at 6. And see Section 47 C.F.R. § 64.2103(e), referenced by Bell Atlantic at 4.

[23] See MCI at 2-3.

[24] See AT&T at 9; Bell Atlantic at 4-5; NTCA at 8-9; USTA at 4-5 (all noting that a change from the general "reasonableness" standard to that being proffered by the DOJ/FBI would elevate the interests of law enforcement over those of the carrier and possibly ignore other relevant criteria).

[25] See AT&T at 9-10; CTIA at 7-8. The Commission modified its First Report and Order on its own motion, after having been advised by carriers that they do not have information that would allow for recording or tracking start/stop times of interceptions. See Order on Reconsideration ¶ 4.

[26] AT&T at 10.

III. RECONSIDERATION IS ONLY APPROPRIATE REGARDING ISSUES PREVIOUSLY CONSIDERED

The DOJ/FBI end-run around standard pleading and practice procedures[27] is not the only infirmity associated with its request for "reconsideration" on the matter of surveillance status messages. Its arguments are incorrect as a matter of law and policy.

As AT&T and NTCA point out, the differences in the focus between Section 105 (which the Commission has found to be concerned with "policies and procedures" of carriers involved in interceptions and the provision of call-identifying information) and Section 103 (dealing with network "capabilities") demonstrate the impropriety of the DOJ/FBI's argument, in the first instance.[28] Moreover, as Motorola, TIA and PCIA demonstrate, there is nothing in the legislative history (or the FBI's past positioning) supporting a carrier obligation under Section 105 to provide such capability.[29] Such an obligation exists -- or, more correctly, does not exist (as the Commission found) -- based on Section 103. Having abandoned pursuit of this matter under Section 103, the DOJ/FBI should not be heard attempting to engraft such obligation under Section 105.

Even if there were some connection between the two provisions, such that the argument of the DOJ/FBI had some facial claim of propriety, its position should be rejected. As MCI

---

[27] See supra. notes 4, 5. And see CTIA at 5.

[28] See AT&T at 8; NTCA at 6-7.

[29] See Motorola at 2-4; PCIA at 3-4; TIA at 3-4 ("The FBI's surveillance status message is completely irrelevant to [the] Congressional concern with law enforcement intrusion [into carriers' networks]. By manipulating the purpose of section 105, the FBI would impose a technical obligation on carriers that Congress never even imagined when drafting the provision.").

points out, the DOJ/FBI request would "impose an impossible construct on carriers."[30] And, as Motorola and TIA persuasively argue, the DOJ/FBI's position that technical and cost concerns would be irrelevant to the imposition of such an obligation are erroneous.[31]

V. CONCLUSION

For all the above reasons, the PFRs filed by the DOJ/FBI should be denied. The DOJ/FBI PFRs lack either evidence or argument that would warrant a deviation from the prior resolution of the issues by the Commission. And, to the extent the DOJ/FBI seeks reconsideration of an issue never before considered by the Commission, denial of the PFRs is appropriate as a matter of fair pleading practice as well as dubious legal analysis.

Respectfully submitted,

U S WEST, INC.

By: Kathryn Marie Krause
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Its Attorney

Of Counsel,
Dan L. Poole

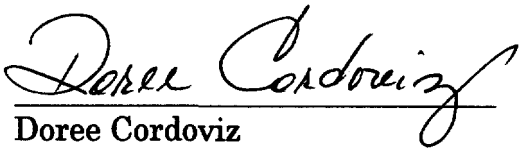
February 23, 2000

[30] MCI at 2. And see Motorola at 5 (stating that "there is no infrastructure in place to permit carriers to monitor networks in the manner requested by the FBI."); BAM at 6.

[31] See Motorola at 4-6; TIA at 4-5 (pointing out that one of Congress' principal concerns was costs and that such costs would not impede the deployment of other new, innovative technologies).

CERTIFICATE OF SERVICE

I, Doree Cordoviz, do hereby certify that on this 23rd day of February, 2000, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served, via first class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Doree Cordoviz

*Served via hand delivery

*William E. Kennard
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Lawrence E. Strickling
Federal Communications Commission
Room 5-C345
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Julius P. Knapp
Federal Communications Commission
6th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Thomas J. Sugrue
Federal Communications Commission
Room 3-C207
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Dale Hatfield
Federal Communications Commission
6th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*John M. Spencer
Federal Communications Commission
3rd Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Rodney Small
Federal Communications Commission
6th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Kris Monteith
Federal Communications Commission
5th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Michael Altschul
Randall S. Coleman
Cellular Telecommunications
Industry Association
Suite 800
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Stephen C. Garavito
Martha Lewis Marcus
AT&T Corp.
Room 1131M1
295 North Maple Avenue
Basking Ridge, NJ 07920

Roseanna DeMaria
AT&T Wireless
Room 1731
32 Avenue of the Americas
New York, NY 10013

Michael E. Glover
John M. Goodman
Bell Atlantic Telephone Companies
1300 I Street, N.W.
Washington, DC 20005

John T. Scott III BAM
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

M. Robert Sutherland
Richard M. Sbaratta
BellSouth Corporation
BellSouth Telecommunications, Inc.
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

L. Marie Guillory
Jill Canfield
National Telephone Cooperative
Association
10th Floor
4121 Wilson Boulevard
Arlington, VA 22203

Anna F. LaLena
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Stewart A. Baker — MOTOROLA
Thomas M. Barba — TIA
L. Benjamin Ederington
Matthew L. Stennes
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

(2 copies)

Rich Barth
Mary Brooner
Motorola, Inc.
Suite 400
1350 I Street, N.W.
Washington, DC 20005

Mary McDermott
Robert L. Hoggarth
Todd B. Lantor
Personal Communications Industry Association
Suite 700
500 Montgomery Street
Alexandria, VA 22314-1561

Alfred G. Richter, Jr.
Roger K. Toppins
Hope Thurrott
SBC Communications Inc.
Room 3203
208 South Akard
Dallas, TX 75202

Grant Seiffert
Matthew J. Flanigan
Telecommunications Industry Association
Suite 350
1300 Pennsylvania Avenue, N.W.
Washington, DC 20004

Charles C. Hunter — TRA
Catherine M. Hannan
Hunter Communications Law Group
Suite 701
1620 I Street, N.W.
Washington, DC 20006

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
United States Telecom Association
Suite 600
1401 H Street, N.W.
Washington, DC 20005

Larry R. Parkinson
Thomas A. Kelley
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Scott R. McIntosh
U.S. Department of Justice
Room 9550
601 D Street, N.W.
Washington, DC 20530